

EXHIBIT HH

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

KATARZYNA FOULGER, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Case No. 4:22-CV-00878
v.)	
)	
AVERTEST, LLC, dba Averhealth)	
)	
Defendant.)	

**DECLARATION OF RICHARD S. CORNFELD IN SUPPORT OF PLAINTIFFS’
MOTION FOR SANCTIONS REPLY BRIEF**

I, Richard S. Cornfeld, hereby declare as follows:

1. I am an attorney, a member of the Bar of this Court, and counsel for Plaintiffs in the above-captioned case. I make this Declaration in support of the Reply Brief in Support of Plaintiffs’ Motion for Sanctions for Averhealth’s Spoliation of Evidence, filed herewith.

2. Averhealth has produced to Plaintiffs 118 “Data Packs” containing data on its testing of Plaintiffs’ samples. The first Data Packs were produced on June 16, 2023, more than four months after Plaintiffs requested all data regarding Plaintiffs’ positive tests on February 1, 2023. In all, Averhealth produced 115 Data Packs between June 2023 and March 2024. Thereafter, Averhealth produced three additional Data Packs, as well as a Data Pack to replace one previously produced with apparently incorrect data, on July 30, 2024.

3. Attached as Exhibit 1 hereto is a document produced by Averhealth to Plaintiffs with the Bates numbers AH0035319 through 35324. This is an email dated August 11, 2022, from Jason Herzog, Averhealth’s then-CEO, to Dominique Delagnes and Michele Glinn referring to a visit that Dr. Kevin Klette was planning to make to Averhealth’s laboratory the following week to review, inter alia, 100 positive testing results. Mr. Herzog states, as shown in this screenshot:

Dominique and Michele,

Kevin would like to come on site for three days next week to review 150 samples. Specifically, he would like to review 100 positive sampled and about 50 PT samples. He would like us to organize the information in the following manner. Can we accommodate this request (recognize the MRO request does not apply)?

1. The drug test positive results to be audited will be selected from a spreadsheet provided by Averhealth. Assemble the following specimen records in the order reflected on the spreadsheet.

- A copy of all reports sent to the MRO (CCF, hard copies of electronic reports if used).
- All chain of custody documentation (specimen and aliquot) for receipt, testing, and storage.
- Initial test data, initial and confirmatory SVT data /results, and confirmatory drug test data supporting the specimens reported results (including data for calibrators, controls, and other specimens in the batch).
- All associated internal documents (e.g., review sheets, and checklist).

2. Organize these records to facilitate their review and provide all of them to the auditor at the beginning of the audit.

- Specimen records must be organized in the order reflected on the spreadsheet.
- All records for a specimen should be clearly linked to facilitate retrieval and review of all records associated with each selected specimen.

Many thanks,
Jason

4. Attached as Exhibit 2 hereto, bearing the Bates numbers AH0035246 through AH0035253, is a document produced by Averhealth containing, on its first page, an email dated August 22, 2022, from Mr. Herzog to Ms. Delagnes with an attachment entitled, “Averhealth Confirmation Data Audit,” by Kein L. Klette, Ph.D. That attachment, containing Dr. Klette’s report, begins at AH0035247. Dr. Klette starts his report as follows, as shown in this screenshot:

Kevin L. Klette, PhD
Klette Forensic Consulting

AVERHEALTH CONFIRMATION DATA AUDIT

The Averhealth drug testing laboratory located at 4709 LaGuardia Dr, Suite 100, St. Louis MO. was audited from 8/16/2022 – 8/18/2022. This audit of MDHHS oral fluid specimen results included a review of the laboratory's chain of custody documentation, analytical confirmation data, reported results, relevant standard operating procedures (e.g., testing, confirmation data review, and reporting procedures), quarterly CAP proficiency testing, and CAP inspection and remediation of inspection findings.

A total of 197 oral fluid specimen results from 2019 through 2022 were audited. The drug groups reviewed included amphetamine, methamphetamine, MDA, MDMA, cannabinoids, cocaine, BZE, opioids (codeine, morphine, 6-A M, hydrocodone, norhydrocodone, and oxycodone), benzodiazepines (diazepam, alprazolam, nordiazepam), buprenorphine, norbuprenorphine, tramadol, and fentanyl.

5. Attached as Exhibit 3 hereto, bearing the Bates numbers AH0021357 through AH0021385, is a document produced by Averhealth titled "Averhealth Confirmation Data Audit Report" by Dr. Klette. On page 3, under the heading "IV. Process," By Dr. Klette states, as shown in this screenshot:

Prior to the audit, Averhealth provided a comprehensive spreadsheet of all MDHHS drug testing results from June 10, 2019, to July 5, 2022. The spreadsheet included the following categories of data: accession number, client number, confirmation instrument, organization identity, date reported, drug name and result, batch number, and the instrument name. From this spreadsheet, I selected a total of 202 LC/MS/MS confirmations of oral fluid only specimen results, including 58 results from 2019, 63 results from 2020, 57 results from 2021, and 24 results from 2022. This set of specimens included an equal distribution of drug groups from the MDHHS contract and the various LC/MS/MS instrument names used in the laboratory. I audited the following drug groups: amphetamine, methamphetamine, MDA, MDMA, cannabinoids, cocaine, BZE, opioids (codeine, morphine, 6-A M, hydrocodone, norhydrocodone, oxycodone, and fentanyl), benzodiazepines (diazepam, alprazolam, nordiazepam), buprenorphine (norbuprenorphine), and tramadol.

Id. at AH0021359. Dr. Klette goes on to list the various actions and criteria according to which

he reviewed each of the 202 data sets.

6. In Paragraph 8 of her Affidavit, ECF 112-2, Dr. Michele Glinn sets forth the information that must be gathered to produce a data pack. In her concluding sentence, she states: “Finally, an affidavit must be composed listing all of the information to be sent.” No affidavit accompanied the Data Packs of Plaintiffs’ tests that Averhealth produced to Plaintiffs, whether individually or collectively.

7. On September 11, 2024, six days after Averhealth responded to this motion, Plaintiffs took the deposition of Dr. Michele Glinn. She gave the following testimony:

Q. Okay. Great. When we talked about chain of custody before we went off the record and took a break, I want to go back to that really quick. So when you as the staff toxicologist or the lab director are going to give an opinion about a test coming from Aver, you need both the chain of custody and the results, correct?

A. Yes. Although -- well, typically, I will just give an opinion on the results.

Q. But I'm saying, to have a defensible test as a company, you -- you know as the lab director and as the staff toxicologist, you need a chain of custody?

A. To tie those results to that sample, yes.

Q. And without it, you can't?

A. We can't tie those results to that sample without it, yes.

See Exhibit 4. This exhibit is an email from the court reporter. The final transcript has not yet been received.

8. The 118 Data Packs on Plaintiffs’ tests that Averhealth produced to Plaintiffs cover tests beginning in August 2019. On June 17, 2023, Averhealth produced Data Packs on tests of David Shnitzer that were conducted in August and September 2019, meaning it produced data that was nearly four years old at that time.

9. In July and August, 2024, Averhealth produced to Plaintiffs documents containing data from Plaintiffs’ tests, as follows:

a. On July 18, 2024, Averhealth produced nine Excel spreadsheets containing such data.

One of those spreadsheets contained ten worksheets, one of which contained 693 rows of data.

- b. On July 30, 2024, Averhealth produced 31 pdf documents consisting of a total of 619 pages, along with one large spreadsheet containing 127 worksheets; all of these documents contained data regarding Plaintiffs' tests.
- c. On August 23, 2024, Plaintiff produced another 11 pdf documents containing a total of 496 pages, as well as five Excel spreadsheets, containing such data. The spreadsheets contained between six and 13 worksheets apiece. Three of those spreadsheets contained worksheets with 1298, 1273 and 323 rows of data, respectively.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 19th day of September 2024.



Richard S. Cornfeld